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I

IN THE

Supreme Court of The United States

OF AMERICA

NUMBER .....

ILLA ROUTH ALLEY SCHURINK

Petitioner

vs.

UNITED STATES OF AMERICA, and
GERTRUDE RHODES ALLEY and
BLUFORD ALLEY

Respondents

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION AND BRIEF FOR CERTIORARI

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PETITION

Illa Routh Alley Schurink prays that a writ of certiorari issue to review the judgment entered in this case November 18, 1949, by the United States Circuit Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Circuit Court of Appeals is reported in 177 Fed. (2d) 809.

JURISDICTION

The judgment below was entered November 18, 1949. The jurisdiction of this Court is invoked under Section 1254 of Title 28, United States Code.

QUESTIONS PRESENTED

1. Does Section 802 (g) of Title 38, U.S.C. require that a wife, designated as beneficiary of National Service Life Insurance, remain the wife of the insured until maturity of the policy or does a divorce meanwhile preclude recovery?

2. Even if an intervening divorce bars recovery, yet does an Alabama divorce, not rendered more than sixty days before maturity of the policy, actually dissolve the marriage or is it interlocutory so that the parties are yet husband and wife for sixty days from rendition of the decree?

STATUTES INVOLVED

The judgment below involves construction of the National Service Life Insurance Act of 1940 as amended prior to August

1, 1946, (Title 38, U.S.C., Sections 801 to 819) and particularly Section 802 (g) of Title 38 U.S.C. It likewise involves construction of Section 38 of Title 34, Code of Alabama of 1940.

STATEMENT

The facts are fully and correctly set forth in the opinion of the Circuit Court of Appeals (177 Fed. 2nd 809). Petitioner sued in the District Court to recover in all $10,000.00 of National Life Insurance on the life of Joseph Bluford Alley, in force at his death. Plaintiff claimed the insurance for the following facts set forth in the amended claim, all chronologically as follows:

1. Plantiff and Joseph Bluford Alley were lawfully married to one another.

2. Alley was inducted into the armed services. By two policies ($10,000.00 in all) of National Service Life Insurance Alley named Plaintiff, his wife, as designated beneficiary to receive proceeds of the insurance in the event of his death.

3. July 19, 1945, Plaintiff, a resident of Alabama, was granted a divorce by the Alabama Courts. The decree, followed the mandate of Title 34, Section 38, Code of Alabama of 1940, providing "neither party shall again marry except to one another, until 60 days after decree rendered * * * ." Alley made no change of beneficiaries.

4. August 9, 1945, while the policies were in full force, Alley died in the United States from non-combat causes.

5. Plaintiff made claim to the proceeds of the policies and her claim was denied.

6. Within the time prescribed by law (38 U.S.C., Section 445) plaintiff sued.

The United States, and Gertrude Rhodes Alley and Bluford Alley (mother and father of insured and contingent beneficiaries of the insurance) moved to dismiss the complaint for failure of plaintiff to show herself the "wife" of the insured at maturity of the policies and hence, under the facts failing to state a claim upon which relief could be granted.

The motion was granted by the District Court and the complaint dismissed. Appeal followed. Judgment in the Court of Appeals affirmed the lower court and held the complaint was properly dismissed.

SPECIFICATIONS OF ERRORS TO BE URGED

1. The Court below erred in holding the complaint was properly dismissed.

REASONS FOR GRANTING THE WRIT

The Circuit Court of Appeals in this case has decided an important question of federal law which has not been, but should be, settled by this Court. In addition, it has decided an important question of local law of Alabama in a way probably in conflict with applicable Alabama statutes and decisions.

SUPPORTING AUTHORITIES AND ARGUMENT

Title 34, Section 38, Code of Alabama of 1940 requires that all divorce decrees rendered in that State prohibit remarriage except to one another, for sixty days (the time al-

lowed for perfecting appeals) or if appeal to be taken, pending the appeal.

The Supreme Court of Alabama has clearly held that the effect of this statute and the decrees rendered in compliance with it, is to render the "entire" divorce "inoperative" (Vance vs. State, 210 Alabama 9, 97 So. 230.) and "not in effect." (Brand vs. State, *242 Ala. 15, 6 So. 2d 446* [revising 6 So. 2d 442, redecided 6 So. 2d 444, affirmed 6 So. 2d 450]). In the *Brand* case, on rehearing, the Court repeated that the decree of divorce ad interim was "not operative and in full force as a decree of divorce." So clearly has the Supreme Court of Alabama held the decree is not in effect for sixty days that in both cited cases it has affirmed bigamy convictions for remarriage within sixty days from decree rendered both within (Vance case) and without (Brand case) the State of Alabama. Bigamy in Alabama is having two spouses at the same time.

Notwithstanding the unequivocal pronouncements of Alabama courts construing their own statute, the Court of Appeals holds in its decision here that the Alabama statute, as construed by its courts, merely prohibits remarriage for sixty days and does not suspend the dissolution of the marriage itself.

Petitioner feels this clearly conflicts with local laws of Alabama as construed by its highest tribunal. If the Court of Appeals decision stands many serious problems of property law, and legal relations as clearly fixed by Alabama law will be raised. Quite obviously, if Alabama holds the decree interlocutory for sixty days there is no divorce. And inheritance, dower, remarriage in other states within that period, are determined in the light of that holding. All to be upset and great

confusion and conflict generated by the Circuit Court of Appeals holding final the otherwise interlocutory order of the Alabama Courts.

The serious local effects aside, the Court's interpretation of the meaning of Section 802(g) of 38 U.S.C. is far reaching.

Over the entire country there are doubtless thousands of cases where a designated wife in a National Service Life policy, either divorced, or was divorced by, a serviceman. The reason and grounds for those divorces are legion. Yet quite often the serviceman may have desired his former spouse should yet receive his insurance. The Circuit Court of Appeals here is the first court we know of to pass exactly upon this question.

It holds that divorce bars recovery of National Service Life Insurance by a designated wife, notwithstanding the insured made no changes in the beneficiary.

The decision conflicts with ordinary rules of law that the test of an "insurable" interest is the status at the time of issuance of a policy of insurance and not at the time of maturity.

It conflicts clearly with the express wording of Section 802 (i) of Title 38, U.S.C., that "the right of any beneficiary to payment of any installments (of insurance) shall be conditioned upon his or her being *alive to receive* such payments." It substitutes a "court-made" test for "alive to receive" and makes the test of right to the insurance "remaining the wife" instead.

The decision does violence to the whole scheme of National Service Life Insurance as expressed in Sections 802

(g), (h), (i), and (j) of Title 38 U.S.C., all based upon "survivorship" rather than "Status at death" in determining the rights of an *expressly designated* beneficiary, lawfully designated and standing in the relations to the insured set forth in Section 802 (9) of the National Service Life Act, *at the time of issuance of the policy.*

The rights of countless possible recipients of any National Service Life policy which matured prior to August 1, 1946, (when amendments removed any question as to policies maturing after that date) are substantially affected by this decision. The importance of the question to the Government as well as to the petitioner, and thousands of beneficiaries, is manifest.

No court, to our knowledge, has directly passed upon the question here presented. Several Circuits have ruled that litigants before them could not recover because, while *designated*, they were not in the status of "wife" at the time of issuance and intervening maturity of the policy and hence could not recover.

Leverly vs U.S., 162 Fed 2d 79

Zazove vs U.S., 156 Fed 2d 24

McClendon vs U.S., 163 Fed 2d 895

Strauss vs U.S., 160 Fed 2d 1017,
Cert. Den., 67 S. Ct. 1741, 331 U.S. 850, 91 L. Ed.1859.

Castor vs U.S., 174 Fed 2d 481

Gehm vs U.S., 83 Fed. Supp. 1003.

CONCLUSION

For the conflict with local Alabama decisions and the great importance of the question presented to countless recipients or potential recipients of matured National Service Life Insurance policies, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

Title 34 Section 38, Code of Alabama 1940:

Right of parties to remarry after divorce. - - -

When a decree has been rendered granting a divorce in this state, the court shall decree that neither party shall again marry except to each other until sixty days after decree rendered, and that if an appeal is taken within sixty days, neither party shall again marry except to each other during the pendency of said appeal.